BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA,	
Complainant,	**Proceeding No.: 20-293**
	Bureau ID No.: EB-20-MD-004
v.	
DUKE ENERGY PROGRESS, LLC,	
Defendant.	

To: The Enforcement Bureau

DUKE ENERGY PROGRESS, LLC'S PETITION FOR RECONSIDERATION

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TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT

The Bureau misapplied the standard of proof for the period governed by the 2011 Order. In its first order after the effective date of the 2011 Order, the Commission dismissed a complaint that a $36.22 rate was unjust or unreasonable because the ILEC failed to produce evidence that the monetary value of its advantages under the joint use agreement were less than the difference between $36.22 and the old telecom rate. Here, the Bureau correctly found: (1) that AT&T receives net material advantages under the JUA; and (2) that AT&T failed to present evidence regarding the monetary value of those advantages. **These two findings alone are fatal to AT&T's claim for relief under the 2011 Order.** The Bureau also erroneously applied the standard applicable to "new" agreements for the period governed by the 2011 Order, even though the Bureau correctly found that the JUA at issue here was an "existing" agreement. The Bureau should correct its errors and find that AT&T is not entitled to relief under the 2011 Order.

The Bureau also ignored the record evidence in this case and seemed to find, as a matter of law, that the communication workers safety zone (a/k/a "safety space") on DEP's poles was "usable and used by" DEP. There is no basis in the record for this finding. The uncontroverted evidence is that DEP does not need and does not use the safety space on its own poles. DEP built safety space into its network of poles specifically because of the JUA. This space, which has an ongoing cost, is not needed for the provision of electric service. The Bureau's decision to exclude the safety space from AT&T's space allocation has the effect of shifting the entire cost of the safety space to DEP and its ratepayers. The Bureau should correct this error by either allocating the safety space to AT&T or, at a minimum, allocating a pro rata share of the space to AT&T.

The Bureau also incorrectly rejected DEP's evidence regarding the value of the net material advantages to AT&T under the JUA. For example, although it found that the contractual right to remain attached post-termination was a material advantage to AT&T, the Bureau nonetheless found that DEP's valuation was "speculative and lacking support" because DEP's valuation assumed that, in the absence of this right, the parties would be required to remove their facilities from each other's poles. The Bureau's rejection of DEP's evidence supposed, without explanation or alternative, that such a result would never come to pass. Further, the Bureau all but ignored the enormous value AT&T derives from the "tabulated cost" provision of the JUA, under which AT&T pays far lower pole replacement costs than DEP's CATV and CLEC licensees. The Bureau should correct these errors and account for these net benefits and costs through additional space allocations to AT&T under the old telecom rate formula.

The Bureau also gave short shrift to the significance of **when** AT&T first requested to renegotiate the JUA rates. The Bureau performed no analysis on how the timing of this request impacted whether a refund was "appropriate" under Rule 1.1407(a)(3). The Bureau performed no analysis on how the timing of this request, which was after the effective date of the 2018 Order, impacted whether AT&T demonstrated that it genuinely lacked the ability to obtain a new arrangement, for purposes of obtaining relief under the 2011 Order. The fact that AT&T did not even attempt to obtain a new arrangement until after the effective date of the 2018 Order should be fatal to its claim for relief under the 2011 Order.

Pursuant to Rule 1.106, Duke Energy Progress, LLC ("DEP") petitions the Enforcement Bureau to reconsider certain portions of its September 21, 2021 Memorandum Opinion and Order in the above-captioned proceeding (the "Order") and to either vacate the Order or issue a new order consistent with DEP's requests herein.

ARGUMENT

I. The Bureau Should Reconsider Its Finding that AT&T Is Entitled to Relief Under the 2011 Order.

The Bureau correctly acknowledged that AT&T enjoys material benefits under the joint use agreement between the parties (the "JUA") as compared to competitive local exchange carriers ("CLECs") and cable television systems ("CATVs") attached to DEP's poles.[1] The Bureau also correctly found that AT&T did not provide "a credible valuation of the advantages that AT&T receives under the JUA."[2] Nevertheless, the Bureau found that "AT&T has shown that the material advantages it receives under the JUA do not justify the JUA rates…."[3] Based on this finding, the Bureau determined that AT&T should have been charged no more than the Old Telecom Rate during the payment periods governed by the 2011 Order.[4] This finding (a) is irreconcilable with the 2011 Order and Commission authority regarding the burden of proof under the 2011 Order; (b) applies the legal standard for "new" agreements rather than "historical" agreements; and (c) ignores the fact that AT&T never even attempted to terminate the JUA and obtain a new arrangement until after the effective date of the 2018 Order.[5]

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[1] *See, e.g.*, Order at ¶¶ 16-33, 35, 41.

[2] *Id.* at ¶ 47.

[3] *Id.* at ¶ 42.

[4] *Id.* at ¶ 47; *see also Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240 (Apr. 7, 2011) (the "*2011 Order*").

[5] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Development by Removing Barriers to*

A. The Bureau Erred in Finding that AT&T Satisfied Its Burden of Proof under the 2011 Order.

The JUA at issue here constitutes an "existing" or "historical joint use agreement" under the 2011 Order.[6] Furthermore, the Bureau determined that the JUA gives AT&T a competitive advantage over CLECs and CATVs attached to DEP's poles.[7] Therefore, under the 2011 Order, AT&T bears the burden of demonstrating that the "monetary value" of the benefits under the JUA does not justify the difference between the "rate" AT&T paid under the JUA and the Old Telecom Rate.[8] In the first case decided by the Commission after the effective date of the 2011 Order, the Commission rejected an ILEC's complaint that a $36.22 rate was unjust and unreasonable even though it exceeded the Old Telecom Rate by nearly 300%. The Commission held:

> [W]e find that Verizon has adduced insufficient evidence to support a finding that the Agreement Rates are unreasonable, or for the Commission to set a just and reasonable rate. Verizon concedes that it received and continues to receive benefits under the Agreement that are not provided to other attachers, **but it has not produced any evidence showing that the monetary value of those advantages is less than the difference between the Agreement Rates and the New or Old Telecom Rates over time.... Absent such evidence, we are unable to determine whether the Agreement Rates are just and reasonable**.[9]

As the Bureau expressly acknowledged, AT&T failed to produce any evidence showing that the "monetary value" of the benefits it enjoys "is less than the difference" between the "rate" it pays under the JUA and the Old Telecom Rate.[10] "Absent such evidence," there was no way for the

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Infrastructure Investment, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705 (Aug. 3, 2018) (the "*2018 Order*").

[6] *See* Order at ¶¶ 3, 36 n.109; *see also* 2011 Order, 26 FCC Rcd at 5334-37, ¶¶ 216-17.

[7] *See* Order at ¶¶ 16-33, 35, 41.

[8] *See* 2011 Order, 26 FCC Rcd at 5333-37, ¶¶ 214-19; *Verizon Fla. LLC v. Fla. Power and Light Co.*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1149-50 at ¶ 23-24 (Feb. 11, 2015) (the "*Verizon Florida Decision*").

[9] *Verizon Florida Decision*, 30 FCC Rcd at 1149-50 at ¶ 24 (emphasis added).

[10] *See* Order at ¶ 47 (finding that AT&T did not provide a "credible valuation of the advantages AT&T receives under the JUA").

Bureau to determine whether the "rate" under the JUA was "just and reasonable" for the period governed by the 2011 Order.[11]

The Bureau failed to address the *Verizon Florida Decision* in its analysis of whether AT&T had satisfied its burden of proof under the 2011 Order. The *Verizon Florida Decision* was the sole guidepost for disputes relating to "existing" or "historical" agreements under the 2011 Order prior to the effective date of the 2018 Order. Furthermore, there are no material grounds upon which the *Verizon Florida Decision* is distinguishable from the facts in this proceeding. Like the JUA between AT&T and DEP, the joint use agreement at issue in the *Verizon Florida Decision*: (a) was an "existing" or "historical joint use agreement" under the 2011 Order: and (b) provided the ILEC with material benefits that gave it a competitive advantage over other attaching entities.[12]

Perhaps because the order does not address the *Verizon Florida Decision*, the Bureau determined that AT&T met its burden of proof solely by pointing to "rate" each party pays under the JUA and arguing that they are not "proportional" on a per-foot-of-space-occupied basis.[13] This is not the correct legal standard.[14] As clearly set forth in the *Verizon Florida Decision*, AT&T

[11] *See Verizon Florida Decision*, 30 FCC Rcd at 1149-50, ¶ 24.

[12] *See id.* at 1149, ¶ 23 ("The agreement here is not a new agreement. It is 'an historical joint use agreement'...."); *id.* at 1148, ¶ 21 ("...Verizon has received, and continues to receive, unique benefits under the Agreement...").

[13] Order at ¶ 42 ("The rate AT&T pays Duke under the JUA is about 75 percent of the rate Duke pays AT&T, even though Duke's attachments occupy much more space on the poles."). The Bureau's "proportionality" analysis ignores the fact that DEP pays a per pole rate that [redacted] AT&T's entire pole cost, while AT&T pays a per pole rate that only accounts for a [redacted] of DEP's annual pole cost. For example, in 2019, DEP paid a per pole rate that was [redacted] more than AT&T's entire annual pole cost in North Carolina and nearly [redacted] more than AT&T's entire annual pole cost in South Carolina, while AT&T paid a per pole rate that only accounted for [redacted] of DEP's annual pole cost. *See* DEP's Answer at ¶¶ 22, 25 n.94. Based on this metric, the "disproportionality" of the JUA's cost sharing methodology skews heavily in AT&T's favor.

[14] It is unclear how "proportionality" seeped into the analysis of an ILEC's burden of proof under the 2011 Order. The concept of "proportionality" is only mentioned once—and in an entirely different context—within the 2011 Order: "[W]e would be skeptical of a complaint by an [ILEC]

bears the burden of proving that the "rate" it pays is not justified by the "monetary value" of the competitive advantages it enjoys under the JUA. Moreover, this "proportionality" standard was not applied in the *Verizon Florida Decision*—even though the joint use agreement in that proceeding allocated a much higher percentage of the annual pole costs to the ILEC.[15] Finally, the Bureau's "proportionality" analysis is also entirely arbitrary. In hypothesizing DEP's per-foot "rate" for purposes of its analysis, the Bureau relied upon DEP's "typical" space utilization [redacted] because it was "consistent with the terms of the 1977 JUA, which allocated [redacted] of space on joint use poles to Duke's predecessor."[16] Yet, when calculating AT&T's per-foot "rate," the Bureau relied solely upon the Commission's presumptive 1-foot space occupied input, even though: (1) the 1977 JUA allocated [redacted] of space to AT&T; and (2) DEP's evidence indicates that AT&T's "typical" space utilization is [redacted].[17] In other words, the Bureau's "proportionality" analysis is not only unlawful but also tainted by selection bias.

B. The Bureau Erred by Applying the Legal Standard Applicable to "New Agreements" to the Parties' "Historical Joint Use Agreement."

For the period governed by the 2011 Order, there are only two types of joint use agreements: "existing" (a/k/a "historical") and "new." Each is governed by a different standard. As the Bureau correctly noted, the JUA at issue here is not a "new" agreement, but instead an "existing" or "historical" agreement.[18] For periods governed by the 2011 Order, the Old Telecom

seeking a proportionately lower rate to attach to an electric utility's poles than the rate the [ILEC] is charging the electric utility to attach to its poles." 2011 Order, 26 FCC Rcd at 5337, ¶ 218.

[15] The joint use agreement in the *Verizon Florida Decision* allocated 50% of annual pole costs to the ILEC. *See Verizon Florida Decision*, 30 FCC Rcd at 1143, ¶ 10. AT&T calculated that the "rate" it pays is equivalent to [redacted] of DEP's annual pole costs. *See* Order at ¶ 42 n.138 (citing AT&T's Complaint at ¶ 17 n.65).

[16] Order at ¶ 42 & n.139.

[17] *See id.* at ¶ 42 & n.140; *see also* DEP's Answer at Exh. 2, DEP000140 (1977 JUA, Art. I.A.2); *id.* at Exh. A, DEP000248 (Decl. of Scott Freeburn, Nov. 13, 2020 ("Freeburn Decl.") ¶ 9).

[18] *See* Order at ¶ 36 n.109.

Rate is a "reference point" **only** with respect to "**new**" agreements. The Old Telecom Rate is neither a "reference point" nor otherwise relevant with respect to "existing" or "historical" agreements. In the *Verizon Florida Decision*, the Commission stated:

> In support of applying the Old Telecom Rate, Verizon cites the *Order*'s statement that the Commission would consider the Old Telecom Rate "as a reference point" when determining a just and reasonable attachment rate for a "*new agreement*" between an incumbent LEC and a utility. The agreement at issue here is not a new agreement. It is "an historical joint use agreement," which the Commission repeatedly distinguished from "new agreements."[19]

Given this, and as set forth above in Section I.A. *supra*, the Commission held in the *Verizon Florida Decision* that it was the ILEC's burden to demonstrate that the "monetary value of [the advantages under the Agreement] is less than the difference between the Agreement Rates and the New or Old Telecom Rates over time."[20] AT&T made no such showing, here.[21]

Despite the clear burden of proof under the 2011 Order, and despite the Bureau's acknowledgement that AT&T has not met this burden, it appears the Bureau erroneously grafted the Old Telecom Rate as a "reference point" for "existing" or "historical" agreements. In finding that "AT&T is entitled to a rate for the period prior to January 1, 2020 that does not exceed the Old Telecom Rate," the Bureau cites to paragraph 218 of the 2011 Order—a paragraph that specifically (and only) addresses "new" agreements.[22] In addition to the sharp distinction drawn by the Commission between "new" agreements and "existing" agreements, the 2011 Order also plainly advised that it was "unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable."[23] This guidance, along with the fact that the Old Telecom

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[19] *Verizon Florida Decision*, 30 FCC Rcd at 1149, ¶ 23 (italics in original).

[20] *See id.* at 1149, ¶ 24.

[21] *See* Order at ¶ 47 (noting that AT&T had not "provided a credible valuation of the advantages that AT&T receives under the JUA").

[22] *See id.* at ¶ 47 & n.161 (citing 2011 Order, 26 FCC Rcd at 5337, ¶ 218).

[23] *See* 2011 Order, 26 FCC Rcd at 5335, ¶ 216.

Rate is a "reference point" **only** with respect to "**new**" agreements, explains why the Commission rejected an ILEC's complaint in the *Verizon Florida Decision* that a $36.22 rate was unlawful even though it exceeded the Old Telecom Rate by almost 300%.[24]

C. The Bureau Should Reconsider Its Finding that AT&T "Genuinely Lacked the Ability to Terminate the JUA and Obtain a New Arrangement" For the Period Governed by the 2011 Order.

In the 2011 Order, the Commission "question[ed] the need to second guess" "historical joint use agreements" and stated that it was "unlikely to find the rates, terms and conditions" in such agreements unjust or unreasonable.[25] Yet, the Commission created a narrow avenue for reviewing "historical joint use agreements" where an ILEC could "demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement."[26] The Bureau, here, found that AT&T "demonstrated that it 'genuinely lacks the ability to terminate the JUA and obtain a new arrangement.'"[27]

In doing so, the Bureau glossed-over the threshold issue of **when** AT&T first attempted "to terminate an existing agreement and obtain a new arrangement." Based on the undisputed evidence in the record, AT&T did not even request renegotiation of the JUA rates until May 22, 2019—after the effective date of the 2018 Order. AT&T's inaction is especially problematic, here, considering the JUA requires written notice as a precondition to any "rate" renegotiation:

> Either party may make a request for review of the pricing methodology and the costs set forth in the Exhibits to this Agreement no sooner than at five (5) year intervals. This request must be in writing and forwarded to the other party as

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[24] In the only other decision prior to the effective date of the 2018 Order, *Verizon Virginia, LLC v. Virginia Electric and Power Co.*, Order, Proceeding No. 15-190, 32 FCC Rcd 3750, 3756 at ¶ 12 (May 1, 2017), the Commission relied upon "unique circumstances presented here" to conclude that the agreement at issue was a "new" agreement for purposes of finding the rate to be unjust and unreasonable.

[25] 2011 Order, 26 FCC Rcd at 5335, ¶ 216.

[26] *Id.* at 5335-36, ¶ 216.

[27] *See* Order at ¶ 37 (internal brackets omitted).

specified in Article XVI.[28]

Thus, AT&T is legally and contractually barred from recovering relief for the period prior to its written notice requesting renegotiation of the pricing methodology.

Moreover, the record demonstrates that AT&T never sought to "obtain a new arrangement" under the guidance of the 2011 Order. AT&T has maintained throughout this dispute that it was entitled to the New Telecom Rate for all periods at issue.[29] But AT&T was **never** entitled to the New Telecom Rate under the 2011 Order because (a) the JUA was entered into before the 2011 Order and is thus an "existing" or "historical" agreement, and (b) the 2011 Order makes clear that the Commission would only consider applying the New Telecom Rate to "new" joint use agreements.[30] In essence, AT&T waited until after the effective date of the 2018 Order to ask about renegotiating rates, and then pretended as if the same standard applied on both a backward-looking and forward-looking basis.

Finally, the Bureau states that "Duke's substantial five-to-one pole ownership advantage, in combination with a relatively high attachment rate…supports an inference of AT&T's inferior bargaining position relative to Duke, and thus supports our decision to review the JUA's rates."[31] However, the terms and conditions of the JUA, including the cost sharing methodology, have not changed since the JUA was executed in 2000. Thus, DEP argued in its answer that, to demonstrate a disparity in bargaining power, AT&T must prove either: (1) that the JUA was unjust and unreasonable "at the time it was executed"; or (2) that DEP "subsequently wielded a growing pole ownership imbalance to its financial benefit."[32] AT&T made no such showing. Nevertheless, the

[28] DEP's Answer at Exh. 1, DEP000128 (JUA, Art. XIII.D).
[29] *See, e.g.*, AT&T's Complaint at ¶¶ 31-33; AT&T's Reply at ¶ 8, 13, 21, 28, 31.
[30] *See* 2011 Order, 26 FCC Rcd at 5336, ¶ 217.
[31] Order at ¶ 38.
[32] *See* DEF's Answer at ¶ 26.

Bureau rejected DEP's argument out of hand, stating "we see no reason to require AT&T to establish that the JUA was unjust and unreasonable in **1969**, more than fifty years ago."[33] The reference to "1969" is obviously a copy-and-paste error from the Bureau's August 27, 2021 decision in *AT&T Florida v. Duke Energy Florida*.[34] But this copy-and-paste error leads to a substantive error because the Bureau then equates the JUA rates to a vestige of the "pre-competition 1970's."[35] The JUA at issue here, though, was executed in November 2000—at the height of the facilities-based competition ushered-in by the 1996 Act.

II. The Bureau Should Reconsider Its Finding that the JUA "Renewed" on January 1, 2020 and Every Year Thereafter With Respect to Existing Attachments.

The Bureau found that the "JUA created a series of one-year contracts that have automatically renewed on January 1st of each year since 2001."[36] Based on this finding, the Bureau determined that the JUA renewed for purposes of the 2018 Order on January 1, 2020.[37] The Bureau should reconsider its finding, insofar as it applies to existing attachments, for at least two reasons. First, the Bureau failed to address DEP's argument that there can be no "renewal" when there is no right of termination.[38] Reading a "renewal" provision into a JUA that provides no right of termination (or "non-renewal") is paradoxical. Instead of addressing this paradox, the Bureau broadly referenced the 2018 Order and the *Verizon Maryland Decision*[39] as justifying its finding, even though neither of those decisions address DEP's specific argument.[40] Second, the Bureau

[33] Order at ¶ 38 n.123.
[34] *See id.*
[35] *See id.*
[36] *Id.* at ¶ 14.
[37] *See id.* at ¶ 10.
[38] *See* DEP's Answer at ¶¶ 3, 11, 21, 38.
[39] *Verizon Md. LLC v. Potomac Edison Co.*, Memorandum Opinion and Order, Proceeding No. 19-355, 35 FCC Rcd 13607 (Nov. 23, 2020) (the "*Verizon Maryland Decision*").
[40] *See* Order at ¶ 12.

relied solely on the *Verizon Maryland Decision* to reject DEP's argument that "renewal" requires some voluntary action by the parties.[41] However, the fact the Commission incorrectly decided this issue in the *Verizon Maryland Decision* does not mean the Bureau should repeat the error, here.

III. The Bureau Should Reconsider Its Decision to Exclude the Communications Worker Safety Zone from AT&T's Space Allocation.

The Bureau, relying solely on distinguishable precedent and without considering DEP's unrefuted evidence, refused to allocate any portion of the communications worker safety zone (a/k/a "safety space") to AT&T because: "AT&T's attachments do not occupy the communications safety space…."[42] There are at least two errors embedded in the Bureau's findings.

First, the Bureau ignored the Commission's foundational "cost causation" principles.[43] DEP presented substantial witness testimony establishing that: (a) DEP does not need and does not use safety space on its own poles; (b) the safety space serves no purpose in the provision of electric service; and (c) but for the JUA, DEP would not have built safety space into its pole network in its overlapping service territory with AT&T.[44] Second, all of the authority cited by the Bureau turns, in whole or in part, on the Commission's previous finding that the "safety space is usable and used by the electric utility."[45] However, DEP presented evidence demonstrating that it

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[41] *See id.* at ¶ 13.

[42] *Id.* at ¶ 51 (citations omitted).

[43] *See, e.g.*, 2011 Order, 26 FCC Rcd at 5301, ¶ 143 ("Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer—the cost causer—pays a rate that covers this cost.").

[44] *See* DEP's Answer at ¶¶ 12 & n.38, 16 & n.58, 25; *see also id.* at Exh. A, DEP000252-53 (Freeburn Decl. ¶¶ 17-18); *id.* at Exh. B, DEP000285, DEP000289-90 (Decl. of David J. Hatcher, Nov. 13, 2020 ("Hatcher Decl.") ¶¶ 9, 18); *id.* at Exh. C, DEP000296-97 (Decl. of Steven D. Burlison, P.E., Nov. 13, 2020 ("Burlison Decl.") ¶¶ 7-10).

[45] *See* Order at ¶ 51 n.171 (citing *BellSouth Telecomms., LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, Memorandum Opinion and Order, Proceeding No. 19-187, 35 FCC Rcd 5321, 5330 at ¶ 16 (May 20, 2020) ("*FPL I Decision*") ("The [safety] space is usable and used by the electric utilities.") (quotation marks and citation omitted); *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-98, 15 FCC Rcd 6453, 6467 at ¶ 22 (Apr.

does not need and does not use the safety space on its own poles.[46] AT&T presented no contrary evidence. Instead, AT&T relied solely on distinguishable precedent and argued that DEP "occupies [redacted] of space under the FCC's rate assumptions, which includes 3.33 feet of safety space that is 'usable and used by the electric utility.'"[47] Whether space is "usable and used by" DEP, though, is an inherently factual inquiry.

The Bureau's finding has the effect of allocating the **entire** cost of the safety space to DEP and its ratepayers. As explained in DEP's unrebutted witness testimony: "No sound ratemaking rationale would support allocating such a cost to DEP and its electric ratepayers."[48] If the Bureau does not allocate the 40" of safety space to AT&T, the Bureau should either: (1) allocate a [redacted] pro rata share of the safety space to AT&T as additional usable space occupied;[49] or (2) add the 40" (3.33') safety space to the unusable space for purposes of calculating the Old Telecom Rate.[50]

3, 2000) ("The [safety] space is usable and is used by the electric utilities."); *Amendment of the Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130, ¶ 51 (May 25, 2001) ("No new arguments or evidence was presented in the filings and based on our previous reasoning, that the [safety] space is usable and used by the electric utility, we reject arguments to reduce the presumptive usable space of 13.5 feet by 40 inches."); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, FCC Docket No. 78-144, 72 F.C.C.2d 59, 71, ¶ 24 (May 23, 1979) ("Thirdly, we note the common practice of electric utility companies to make resourceful use of this [safety] space by mounting street light support brackets, step-down distribution transformers, and grounded, shielded power conductors therein.")).

[46] *See supra* note 44.

[47] AT&T's Complaint at ¶ 25; *see also* AT&T's Reply at ¶¶ 5, 12, 25.

[48] *See* DEP's Answer at Exh. D, DEP000309 (Decl. of Dana M. Harrington, Nov. 12, 2020, ¶ 17).

[49] When the 40" of safety space is divided by [redacted] (which is the average number of attaching entities, excluding DEP), it yields [redacted]. And if the Bureau is of the view that AT&T should pay no more for the safety space than CATV and CLEC attachers, then the most equitable solution is that each attaching entity other than DEP is allocated a pro rata share of the safety space as usable space occupied.

[50] Including the safety space in the unusable space is the least equitable of the proposed alternatives in that it results in DEP bearing more than [redacted] of the cost of space it does not need and does not use in the provision of electric service. Including the safety space within the unusable space means (a) that only 2/3 of the space is allocated through the Old Telecom Rate formulas (in other words,

IV. The Bureau Should Reconsider Its Dismissal of DEP's Valuation of Certain Benefits of the JUA.

A. The Bureau Should Reconsider Its Non-Finding Regarding the Cost Advantage AT&T Enjoys Under the "Tabulated Cost" Provision of the JUA.

Finally, the Bureau all but dismissed the enormous value AT&T derives from the "tabulated cost" (a/k/a "scheduled costs") provision of the JUA, pursuant to which AT&T pays less than [redacted] of the actual costs DEP incurs in performing pole replacements on AT&T's behalf. Specifically, the Bureau stated: "Because the record does not indicate the extent to which equipment transfer costs are included in Duke's average cost estimate or in the Exhibit B scheduled cost for a pole replacement, we make no finding with respect to Duke's claim that the average cost advantage to AT&T is {[[redacted]]}."[51] The Bureau's "non-finding" ignores the record evidence in this proceeding. DEP submitted witness testimony explaining that, under the "tabulated costs" provision of the JUA, AT&T pays a fraction of what DEP's CATV and CLEC licensees pay for pole replacements:

> [I]f AT&T needs DEP to replace an existing 40-foot pole with a 45-foot pole—either because it needs more space for additional facilities or because it has caused a violation—then AT&T's cost responsibility is limited to the amount set forth in Table I of Exhibit B. The current value in Table I of Exhibit B for any pole 50 foot or less is [redacted]. *See* Exhibit 5 to DEP's Answer. In contrast, if the same need arises for one of DEP's CATV or CLEC licensees, the CATV or CLEC licensee would be required to pay actual work order cost. In 2019, the average cost of a pole replacement for DEP was [redacted]. **This means that, on average AT&T gets a [redacted] discount as compared to CATV and CLEC licensees for the same work**.

Mr. Freeburn's testimony makes clear that this is an apples-to-apples comparison. For precisely

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only 2.22' of the 3.33' is allocated, leaving DEP with 1.11' at the start), and (b) that the remaining 2.22' is allocated equally among all attaching entities (including DEP), which means DEP ends-up bearing an additional [redacted] (2.22'/[redacted]=[redacted]).

[51] Order at ¶ 26.

[52] DEP's Answer, Exh. A at DEP000256 (Freeburn Decl. ¶ 24) (emphasis added).

the same scope of work. DEP's CATV and CLEC licensees are required to pay "actual work order" costs, which averaged [redacted] in 2019, while AT&T is only required to pay the "tabulated cost" for such work, which currently stands at [redacted].

The Bureau's confusion regarding the "the extent to which equipment transfer costs are included" in the "tabulated cost" for a pole replacement is predicated solely on the following testimony from AT&T witness Nea Dalton:

> The reason that Mr. Freeburn says actual costs are higher is because he adds costs for additional work when describing a "pole replacement." For example, Exhibit B sets the cost to "replace pole," **which is the replacement cost for the pole itself**. Mr. Freeburn compares that replacement pole cost to the combined costs to replace the pole *and* complete additional transfer work after the pole is replaced. As a result, he says an average pole replacement was [redacted] in 2019, but that is an extraordinarily excessive cost for the work actually included in the "replace pole" category of Exhibit B. Mr. Freeburn's comparison is thus misleading and useless.[53]

AT&T's misleading innuendo is that it pays equipment transfer costs in addition to the tabulated costs. Innuendo is not evidence, though, and there is a good reason AT&T stopped short of actually testifying that it pays for equipment transfer costs: **it would have been a lie**.

Ms. Dalton makes clear that the "transfer work" to which she alludes is the cost of transferring DEP's electric facilities to a replacement pole.[54] The JUA, though, clearly insulates AT&T from the cost of transferring DEP's electric facilities:

> Except as otherwise expressly provided herein, **each party shall place, maintain, rearrange, transfer, and remove its own Attachments at its own expense**, and shall at all times perform such work promptly and in such manner as not to interfere with service being supplied or work being done by the other party.[55]

As explained by Mr. Freeburn, between 2009-2017 alone, "[t]his represents a cost savings to

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[53] AT&T's Reply Legal Analysis at Exh. D, ATT00415-16 (Decl. of Nea Dalton, Dec. 18, 2020 ("Dalton Decl.") ¶ 10) (italics in original) (bold underline emphasis added); *see also* Order at ¶ 26 & n.83.

[54] *See* AT&T's Reply Legal Analysis at Exh. D, ATT00416 (Dalton Decl. ¶ 10 n.7).

[55] DEP's Answer at Exh. 1, DEP000122 (JUA, Art. VI) (emphasis added).

AT&T of approximately [redacted] and represents an actual cost to DEP in a corresponding amount."[56] This provides AT&T with a massive competitive advantage over CATVs and CLECs on the same poles.[57]

B. The Bureau Should Reconsider DEP's Valuation of AT&T's Right to Remain Attached to DEP Poles Following Termination of the JUA.

The Bureau correctly found that AT&T's right to remain attached to DEP poles even after termination of the JUA is a material advantage over CATVs and CLECs attached to the same pole.[58] DEP submitted a detailed valuation of this contractual right through the declaration of Kenneth P. Metcalfe, a Certified Public Accountant and Certified Valuation Analyst. Mr. Metcalfe testified that AT&T enjoys an annualized net benefit of [redacted] per pole, which greatly exceeds AT&T's current rate under the JUA.[59] AT&T never offered a valuation of its own. Nonetheless, in a footnote, the Bureau rejects Mr. Metcalfe's valuation, stating: "Because Duke once again

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[56] *See id.* at Exh. A, DEP000256-57 (Freeburn Decl. ¶ 25).

[57] Recent filings by CATVs, CLECs, and their trade associations demonstrate the enormous value of the "tabulated cost" provision of the JUA. For example, NCTA filed a Petition for Expedited Declaratory Ruling with the Commission in July 2020, alleging that pole replacement costs can comprise as much as 33% of the total cost of a deployment project and urging the Commission to shift the vast majority of pole replacement costs to electric utilities. *See*, Petition for Expedited Declaratory Ruling of NCTA at 3-4, 9-12, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Jul. 16, 2020); *see also* Initial Comments of Charter Communications, Inc. at 5, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Sep. 2, 2020) (alleging pole replacements comprised 25% of total costs of recent deployment project). In a proceeding before the Kentucky Public Service Commission ("KPSC"), the Kentucky Broadband & Cable Association ("KBCA") urged the KPSC to reconsider how pole replacement costs are allocated to CATVs and CLECs because "the most significant cost—by far—associated with new aerial communications deployments is the cost of pole replacements." Comments of KBCA at 5, *Proposed Regulations Regarding Access and Attachments to Utility Poles and Facilities* (filed Sep. 15, 2020), accessible at: https://psc.ky.gov/home/pscregulations.

[58] *See* Order at ¶¶ 21-23; *see also Verizon Maryland Decision*, 35 FCC Rcd at 13614-15, ¶ 20 (finding that right to remain attached to existing joint use poles following termination was among the "material advantages over competitive LEC and cable attachers on the same poles").

[59] *See* DEP's Answer at Exh. E, DEP000333-34, DEP000361 (Decl. of Kenneth P. Metcalfe, CPA, CVA, Nov. 12, 2020 ("Metcalfe Decl.") ¶¶ 18-21, Exh. E-2).

assumes that AT&T would incur the costs of a duplicate network, plus other costs, in arriving at this figure, we find that Duke's analysis is speculative and lacking support."[60] But neither AT&T nor the Bureau identified what would happen without a contractual right to remain attached. Instead, the Bureau ignored the consequences of post-termination removal by stating: "The Commission has never condoned valuing an alleged advantage by assuming that, without the JUA, an incumbent LEC would have built a duplicate pole network."[61] There are numerous problems with this scant analysis.

As support for this proposition, the Bureau cites to its own finding in the *FPL I Decision*, which in turn relies upon a 1977 Congressional finding that "owing to a variety of factors…there is often no practical alternative except to utilize available space on existing poles."[62] Congress, of course, was talking about CATVs—not telephone companies. Telephone companies like AT&T have always had—and still have—the ability to build pole networks, and there has been no showing otherwise in this case. In fact, it is not uncommon for a telephone company and an electric utility to have redundant pole lines on opposite sides of the same road. Thus, the Bureau's notion that "this could never happen" is simply incorrect. Further, it does not matter whether the Commission has ever "condoned" valuing the right to remain attached after termination based on the need to construct a new network. If the consequence of termination in the absence of such a provision is removal of facilities, then the only viable method of valuing the right is the next best alternative to deployment for both parties.

The Bureau's error in rejecting Mr. Metcalfe's valuation is compounded by two additional

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[60] Order at ¶ 45 n.152 (internal citation omitted).

[61] *See id.* at ¶ 44.

[62] *See id.* at ¶ 44 n.147 (citing *FPL I Decision*, 35 FCC Rcd at 5330, ¶ 15 (citing S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977 Senate Report), reprinted in 1978 U.S.C.C.A.N. 109)).

facts. First, the Bureau acknowledged that the right to remain attached post-termination was, indeed, a material advantage over CATVs and CLECs attached to the same poles.[63] As a material advantage, it is capable of valuation. AT&T proffered no alternative to the method of valuation identified by DEP. Second, though rejecting the valuation as "speculative and lacking support" when it comes to valuing AT&T's net benefits under the JUA, the Bureau relied upon the valuation for purposes of determining "the disproportionate financial burden AT&T would bear if the parties were to extract themselves from the JUA" and for purposes of determining "the superiority of Duke's bargaining position."[64] Accepting the validity of the valuation for one purpose but rejecting it for another is quintessential arbitrary and capricious decision-making.[65]

C. The Bureau Should Reconsider Its Findings Regarding DEP's Deployment of Taller and Stronger Poles than Necessary for its Own Use in Order to Accommodate AT&T.

DEP submitted evidence that it built, and continues to build, a network of poles taller and stronger than necessary to accommodate AT&T. The Bureau rejected this evidence, saying that it "lacks persuasive support" and that DEP provided "no explanation as to the basis" of DEP's statements that it "erected taller and stronger poles specifically to accommodate AT&T."[66] However, Mr. Freeburn clearly explained that DEP built taller and stronger poles than needed by DEP in order to accommodate AT&T specifically **because of the JUA:**

> Because of the Joint Use Agreement (and the preceding joint use agreements between the parties and their predecessors), DEP's network of distribution poles was built to specifically accommodate AT&T. DEP was able to justify spending more money on its network than necessary for the provision of electric service

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[63] *See id.* at ¶ 21-23.

[64] *Id.* at ¶ 39 & n.130 (citing Kenneth Metcalfe's valuation of the right to remain attached post-termination).

[65] *See, e.g., Sierra Club v. EPA*, 884 F.3d 1185, 1195 (D.C. Cir. 2018) (finding that it was arbitrary and capricious for agency to view data as unreliable for one purpose and to rely on the same data for another purpose).

[66] Order at ¶ 45 & n.150.

> because AT&T was sharing in the cost of the network....
> ...
> For example, both the 1977 JUA and the Joint Use Agreement contemplate a 40-foot joint use pole to accommodate electric and telephone facilities, plus the required separation space. If DEP had constructed its network in the absence of the Joint Use Agreement, DEP would have built a network only to its own service needs; thus, the pole network would have been built with shorter poles. Given that AT&T's allocated space was [redacted] in the 1977 JUA and the typical separation space is 40" (3.33 feet), and given that wood poles come in 5 foot increments, this means DEP, because of the Joint Use Agreement, was on average installing poles that were 5-10 feet taller than necessary to provide electric service.[67]

Though AT&T submitted no contrary evidence, the Bureau nonetheless stated:

> ...Duke's claims appear to be controverted by evidence suggesting that Duke may have had a number of reasons—apart from the JUA—to build taller and stronger joint use poles, including the fact that competitive LECs and cable companies also have required space on Duke's joint use poles for decades.[68]

But rather than citing to any such "evidence," the Bureau goes on to reference previous Commission decisions stating that by 1996, cable and CLEC attachments were so common that Congress granted CATVs and CLECs a mandatory right of access.[69] However, the Commission specifically acknowledged in the 2011 Order that: "it would typically not be economically rational for utilities to build taller poles solely for the possibility of accommodating attachers and therefore incur unreimbursed capital costs...."[70] Consistent with the foregoing, Mr. Freeburn testified:

> DEP does not build or replace its distribution poles, in the normal course, in anticipation of non-ILEC third party attachers like CATVs and CLECs because, to do so would be speculative (and there is little to gain financially given the regulatory limitations on the rental rates that can be charged to non-ILEC third parties like CATVs and CLECs). If space is not available, the third-party pays the entire cost necessary to create additional space, whether through make-ready or a

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[67] DEP's Answer at Exh. A, DEP000249-50 (Freeburn Decl. ¶¶ 11-12); *see also id.* at Exh. B, DEP000285 (Hatcher Decl. ¶ 9) ("DEP has always needed to set a pole 5-10 feet taller than necessary for electric service in order to accommodate AT&T's facilities and the safety space."); *id.* at Exh. C, DEP000297-99 (Burlison Decl. ¶¶ 11-15).

[68] Order at ¶ 45.

[69] *See id.* at ¶ 45 & n.151.

[70] 2011 Order, 26 FCC Rcd at 5302, ¶ 144 n.433 (internal citations omitted).

pole change-out.[71]

Moreover, it is not as if the Bureau rejected the testimony of DEP's witnesses in favor of other, more persuasive, record evidence. Instead, the Bureau cites Exhibit 6 of DEP's Answer as establishing that DEP installed taller poles for its own benefit.[72] Exhibit 6, though, is an [redacted]; and the text quoted by the Bureau concerns the replacement of **poles already in joint use**, rather than the setting of new joint use poles.[73] Thus, the cited language from Exhibit 6 is irrelevant. Furthermore, the Bureau makes much ado about the fact that poles shorter than the "Standard Joint Use Pole" under the JUA might be sufficient for joint use.[74] But whether or not a 35-foot pole or a hypothetical 37.5-foot pole might accommodate AT&T has no bearing on whether "DEP, because of the Joint Use Agreement, was on average installing poles that were 5-10 feet taller than necessary to provide electric service."[75] The Bureau's decision to disregard DEP's evidence is also inconsistent with the *Verizon Florida Decision*, where the Commission stated:

> To accommodate the four feet of space allotted to Verizon, Florida Power installed taller poles at increased cost.
> ...
> Verizon likewise made no attempt to estimate the costs Florida Power incurred by installing taller poles to accommodate Verizon. For its 67,000 attachments, Verizon was not required to pay make-ready costs. . .yet Verizon has made no attempt to quantify the expenses it avoided under the Agreement. Absent such evidence, we are unable to determine whether the Agreement Rates are just and reasonable.[76]

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[71] DEP's Answer at Exh. A, DEP000249 (Freeburn Decl. ¶ 10); *see also id.* at Exh. B, DEP000284-85 (Hatcher Decl. ¶ 8) ("[I]n the absence of the partnership with AT&T, DEP would not have 'speculatively' built a network of poles taller and stronger than necessary to meet its core business purpose because there would have been no guarantee that any entities would come along to share in the cost of the excess capacity, and such a gamble would have thus been unacceptable to DEP from a business perspective….").

[72] *See* Order at ¶ 45 n.151.

[73] *See* DEP's Answer at Exh. 6, DEP000194 ([redacted] at 15).

[74] *See* Order at ¶ 45 n.151.

[75] *See supra* note 67.

[76] *Verizon Florida Decision*, 30 FCC Rcd at 1148, ¶ 21 & 1150, ¶ 24.

D. The Bureau Should Reconsider DEP's Valuation of Inspection and Engineering Costs Incurred by DEP on AT&T's Behalf.

The Bureau also erred by ignoring Kenneth Metcalfe's valuation of the benefits AT&T receives under the JUA through avoided inspection and engineering work performed by DEP on AT&T's behalf. The Bureau wrote: "Because Duke fails to identify the inspections or engineering work that it purportedly performs on AT&T's behalf under the JUA, let alone the avoided cost savings to AT&T, we do not find that the JUA benefits AT&T with regard to avoided inspection and engineering costs."[77] In its Answer, though, DEP provided both an explanation of the engineering and inspection work avoided by AT&T, and a valuation of the benefit of those avoided costs to AT&T. As stated by Mr. Freeburn:

> Unlike DEP's CATV and CLEC licensees, AT&T is not required to submit a permit when making a new attachment. CATV and CLEC licensees must submit an application to attach to DEP's poles, pay the costs associated with that application incurred by DEP, including inspection costs, and wait for their application to be processed in accordance with FCC timelines prior to attaching. AT&T, on the other hand, can attach without submitting a permit to DEP, without paying costs associated with such an application, and without waiting any period of time for DEP to perform each step of the permitting process (including review of the application, survey, make-ready engineering)....
>
> Further, while DEP performs the same post-construction inspections with respect to AT&T's attachments as it performs for CATV and CLEC permit applications, AT&T (unlike CATVs and CLECs) is not charged for that work....[78]

Exhibit A-2 to Mr. Freeburn's declaration provided a list of the inspection and engineering costs avoided by AT&T and paid by DEP's CLEC and CATV licensees.[79] Mr. Metcalfe provided a valuation of the benefit of the avoided inspection and engineering costs to AT&T, determining that after accounting for reciprocal benefits to DEP, "AT&T's annualized net benefit is

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[77] Order at ¶ 34.

[78] DEP's Answer at Exh. A, DEP000254 (Freeburn Decl. ¶ 20-21).

[79] *See id.* at Exh. A, DEP000267 (Freeburn Decl. Exh. A-2).

[redacted], or [redacted] per pole."[80]

E. In Light of the Above, the Bureau Should Reconsider Its Findings Regarding the Rates AT&T Should Pay to DEP Under the JUA.

With respect to the time period governed by the 2011 Order, once the Bureau actually accounts for the value of the net benefits to AT&T, the rate AT&T should pay for periods governed by the 2011 Order should **exceed** the Old Telecom Rate. Even considering only the valuation of the four benefits above, the rates paid by AT&T under the JUA are more than justified.[81] With respect to the time period governed by the 2018 Order, assuming *arguendo* that imposition of the Old Telecom Rate as a "hard cap" is valid here, the value of the benefits discussed *supra* should be accounted for by the Bureau through additional allocation of space to AT&T. For example, the Bureau should include the 5-10 feet of additional space DEP built into the network specifically because of the JUA, rather than relying upon the 1-foot presumption.

V. The Bureau Should Reconsider the Legitimacy of the Old Telecom Rate as a "Hard Cap" Given the Unrefuted Valuation Evidence in This Case.

The Bureau applied the Old Telecom Rate as a "hard cap" for the period governed by the 2018 Order.[82] However, in light of the benefits provided to AT&T under the JUA, and the corresponding **cost** to DEP of providing those benefits, the Bureau's imposition of the Old Telecom Rate as a hard cap violates the Pole Attachments Act. As stated by the United Supreme Court: "The Pole Attachments Act...provides that the minimum reasonable rate is equal to 'the

[80] *See id.* at Exh. E, DEP000335-37, DEP000377 (Metcalfe Decl. ¶¶ 25-27, Exh. E-4.2).

[81] Of course, as set forth above, it is AT&T's burden to prove—with specific and credible valuation evidence—that the joint use agreement rates are not merited by the net benefits under the agreement. The burden is not DEP's.

[82] Order at ¶ 15 ("...AT&T is entitled to a rate, as of January 1, 2020, that does not exceed the Old Telecom Rate."); *see also* 2018 Order, 33 FCC Rcd at 7771, ¶ 129.

additional costs of providing pole attachments....'"[83] Further, imposition of the Old Telecom Rate as a hard cap here violates the Fifth Amendment, pursuant to which "regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible" only if "the rates set are not confiscatory."[84] Here, the Old Telecom Rate does not allow DEP to recoup its actual costs associated with the JUA. The costs associated with just three of the benefits under the JUA illustrate this point.

First, as set forth above in Section IV.A *supra*, AT&T avoids—and DEP incurs—[redacted]/pole in pole replacement costs when AT&T needs more space for additional facilities or to correct a violation. In addition, AT&T pays only tabulated costs for so-called "set and sell" poles. As explained by Mr. Freeburn:

> In addition to the cost savings described above, DEP also replaces many AT&T-owned poles on AT&T's behalf. This is referred to as "set and sell." AT&T reimburses DEP for this work per Table IV of Exhibit B. The current value in Table IV of Exhibit B for any pole 50 foot or less is [redacted]. The actual cost of this work would be more in line with DEP's average replacement cost for 2019 of [redacted], for a cost savings to AT&T of [redacted] per pole. The number of poles DEP replaces for AT&T varies from year to year, but between 2009-2017, DEP replaced [redacted] defective AT&T poles discovered through inspection programs. This represents a cost savings to AT&T of approximately [redacted] and represents an actual cost to DEP in a corresponding amount.[85]

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[83] *FCC v. Fla. Power Corp.*, 480 U.S. 245, 253 (1987) (citing 47 U.S.C. § 224(d)(1)). Moreover, the FCC has repeatedly acknowledged incremental cost serves as the "floor" for pole attachment rates. *See, e.g.*, 2011 Order, 26 FCC Rcd at 5300-01, ¶ 142-43; *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 30 FCC Rcd 13731, 13736-37 at ¶¶ 11-12 (Nov. 24, 2015) (acknowledging that "incremental costs" serve as the "low end" for rates governed by § 224(e)(2) and (3)); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-245, GN Docket No. 09-51, 25 FCC Rcd 11864, 11919-20 at ¶¶ 133-34 (May 20, 2010); *see also Am. Elec. Power Serv. Corp.*, 708 F.3d 183, 189 (D.C. Cir. 2013) (acknowledging that the telecom rate in §224(e) is subject to the lower bound defined in § 224(d)(1)).

[84] *FCC v. Fla. Power Corp.*, 480 U.S. at 253 (internal citations omitted).

[85] DEP's Answer at Exh. A, DEP000256-57 (Freeburn Decl. ¶ 25).

Even considering only the cost difference between tabulated costs and actual costs for purposes of the "set and sell" process, this benefit of the JUA cost DEP [redacted] between 2009 and 2017.[86] Thus, the use of "tabulated costs" versus actual costs cost DEP [redacted] per year over that nine-year period. Because AT&T is attached to 148,064 DEP joint use poles, the use of tabulated costs for the set and sell process costs DEP, on average, [redacted] per pole/year.

Second, as acknowledged by the Bureau, AT&T's ability to use additional space on DEP's poles is a material advantage the JUA affords AT&T:

> The parties' previous joint use agreement allocated {[[redacted]]} of space on Duke's poles to AT&T's predecessor. The current JUA does not specify the amount of space allocated to either party, but generally allows the parties to use an unspecified amount of space on the poles "if the requirements of the Code are met" and "so long as such use does not unreasonably interfere with the use being made by the other party." Such an arrangement is not provided to competitive LEC or cable company licensees. Even if we accept AT&T's contention that it currently uses only one foot of space, the ability to add more attachments, as needed, without additional expense, is an advantage accorded AT&T but not its competitors.[87]

As set forth in Mr. Metcalfe's report, the JUA rates include an implied presumption that AT&T is occupying [redacted] of usable space.[88] Mr. Metcalfe calculated that the annualized net benefit to AT&T of DEP's allocation of [redacted] of space per pole (and after taking into account DEP's allocation of space on AT&T's poles) is [redacted] per pole.[89] Mr. Metcalfe also made clear that this benefit corresponded directly to an actual cost, stating that the annualized net benefit per pole was "[e]qual to AT&T's **cost** less Duke Energy Progress' **cost**."[90]

Third, the Bureau found that avoided permitting costs are a benefit to AT&T under the

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[86] *See id.*

[87] Order at ¶ 20.

[88] *See* DEP's Answer at Exh. E, DEP000339 (Metcalfe Decl. ¶ 32 n.54).

[89] *See id.* at Exh. E, DEP000342, DEP000384 (Metcalfe Decl. ¶ 16, Exh. E-5B).

[90] *See id.* at Exh. E, DEP000384 (Metcalfe Decl. Exh. E-5B) (emphasis added).

JUA.[91] According to Mr. Metcalfe, the avoidance of permitting and inspection costs provides AT&T with an annualized net benefit of [redacted] per pole per year.[92] AT&T avoids these permitting and inspection costs because DEP **absorbs** them (i.e., they are not just a benefit to AT&T, but a cost directly absorbed by DEP), as attested by DEP's witnesses.[93]

[redacted] of the three aforementioned benefits to AT&T under the JUA is [redacted] per pole per year, which is not accounted for through the Bureau's application of the Old Telecom Rate. Application of the Old Telecom Rate is also confiscatory here if it is true, as the Bureau found, that the safety space cannot be considered in calculating the Old Telecom Rate given the safety space: (1) has a measurable cost; and (2) is of no benefit to DEP or its ratepayers.

VI. The Bureau Should Reconsider Its Finding that AT&T Is Entitled to Refunds for Payment Periods Preceding AT&T's First Request to Renegotiate the JUA Rates.

Rule 1.1407(a)(3) states that the Commission may "Order a refund, or payment, **if appropriate**."[94] The Bureau failed to examine whether refunds are "appropriate" for periods prior to good faith notice of a dispute, either generally or with specific reference to the facts of this case.[95] As stated in DEP's Answer:

> Despite its rights under the law since July 12, 2011, AT&T first challenged the cost sharing methodology in the existing joint use agreement on May 22, 2019. Further, AT&T expressly affirmed the correctness of the rates each year through

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[91] Order at ¶¶ 28-30.

[92] *See* DEP's Answer at Exh. E, DEP000336-37, DEP000377 (Metcalfe Decl. ¶ 27, Exh. E-4.2).

[93] *See id.* at Exh. A, DEP000254-55, DEP000267 (Freeburn Decl. ¶¶ 20-21, Exh. A-2).

[94] 47 C.F.R. § 1.1407(a)(3) (emphasis added).

[95] With respect to whether refunds are ever appropriate for periods that precede good faith notice of a dispute, DEP incorporates by reference herein the Petition for Declaratory Ruling and the Reply Comments filed by the Edison Electric Institute in W.C. Docket No 17-84. *See generally*, Petition for Declaratory Ruling of the Electric Edison Institute, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Apr. 20, 2021) (the "EEI Petition"); Reply Comments of the Edison Electric Institute in Support of Its Petition for Declaratory Ruling, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Sep. 10, 2021) ("EEI's Reply Comments").

> 2018. That is, DEP provided the updated rates (per Handy Whitman adjustment, as set forth in Article XIII.C. of the joint use agreement) to AT&T each year. After review and approval, AT&T sent its "Form 6407" to DEP indicating its agreement with the rates. Then, after receiving the "Form 6407" from AT&T, DEP sent the invoice for the annual rentals.[96]

Further, the JUA requires written notice of a request to renegotiate rates:

> Either party may make a request for review of the pricing methodology and the costs set forth in the Exhibits to this Agreement no sooner than at five (5) year intervals. This request must be in writing and forwarded to the other party as specified in Article XVI.[97]

Under these circumstances, it was not "appropriate" for the Bureau to grant refunds for periods prior to AT&T's notice to DEP of a dispute.

Rather than engaging in the required analysis under Rule 1.1407 of whether granting a refund was "appropriate," the Bureau erroneously reduced DEP's argument to a waiver and estoppel argument, and asserted that DEP failed to make the showing of prejudice required in association with those defenses.[98] Even assuming DEP was required to show prejudice or harm, such a showing is easily discernible here for at least three reasons **other** than the [redacted] of dollars of refunds awarded by the Bureau. First, DEP has been prejudiced because it had no opportunity prior to May 22, 2019, when AT&T first provided notice of a dispute, to evaluate AT&T's claim and determine whether DEP believed it appropriate to negotiate new joint use rates. Second, any new rates negotiated between DEP and AT&T during the period between 2011 and 2019 would have been negotiated under the standard set forth in the 2011 Order and the *Verizon Florida Decision* rather than the *ex post facto* standard applied by the Bureau here. Third, as explained in the Duke Energy Letter in Support of EEI's Petition, DEP has been prejudiced by AT&T's failure

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[96] DEP's Answer at ¶ 23 (internal citations omitted); *see also id.* at Exh. A, DEP000257 (Freeburn Decl. ¶ 27) (describing AT&T's Form 6407 certification process).

[97] *See id.* at Exh. 1, DEP000128 (JUA, Art. XIII.D).

[98] Order at ¶ 61.

to provide notice prior to May 22, 2019, because under GAAP, DEP has been unable to reserve for the contingent liability of refunds prior to that date.[99]

VII. The Bureau Should Reconsider Its Finding that AT&T Is Entitled to Recover Refunds Consistent with North Carolina's 3-Year Limitations Period for Breach of Contract Actions.

The Bureau should reconsider its finding "that the applicable limitations period under Commission rule section 1.1407(a)(3) is three years [i.e., the limitations period for breach of contract actions in North Carolina and South Carolina],"[100] and should instead borrow the two-year limitations period from 47 U.S.C. § 415(b). As explained in EEI's Petition for Declaratory Ruling, the Bureau should not apply variable state law limitations periods to pole attachment complaints against electric utilities.[101] First, doing so discriminates against electric utility pole owners vis-à-vis ILECs, which are protected by the two-year statute of limitations set forth in 47 U.S.C. § 415(b).[102] Second, application of state law breach of contract limitations periods to pole attachment complaints creates a highly-variable patchwork of limitations periods based on the arbitrary factor of geography, which is antithetical to Congress' intent that the Commission develop a uniform body of law applicable to the states within its jurisdiction.[103] Third, the Bureau failed to consider how it would "borrow" state law limitations periods in a case like this where the relationship at issue covers poles in multiple states. Though, in this particular case, the state law limitations periods for North Carolina and South Carolina were both three years, what if they had

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[99] *See* Duke Energy Letter in Support of EEI Petition at 5-6, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Aug. 23, 2021).

[100] Order at ¶ 63; *see also id.* at ¶ 59 (noting that a 3-year limitations period governs breach of contract actions in both North Carolina and South Carolina).

[101] *See generally*, EEI Petition.

[102] *See id.* at 6-8.

[103] *See id.*; *see also* EEI Reply Comments at 21-22 (arguing that the Commission should adopt a uniform limitations period for all claims arising under the same federal law).

been different? Would the Bureau have chosen the shorter of the two? The longer of the two? Something in between? Would the Bureau have relied upon the contractual choice of law provision even though the claim at issue is extracontractual? These questions, none of which the Bureau addressed, further expose the error of applying variable state law limitations periods, rather than adopting a uniform, non-discriminatory two-year limitations period as urged in EEI's Petition for Declaratory Ruling.

VIII. The Bureau Should Reconsider and Vacate Its Order for Lack of Jurisdiction Over the Rates, Terms and Conditions for AT&T's Attachments on DEP's Poles.

The Commission does not have jurisdiction to regulate the rates, terms and conditions of AT&T's attachments to DEP's poles under Section 224. Section 224 was never intended to provide ILECs like AT&T with rights as "attachers"—it was intended to regulate ILECs as pole owners, as recognized by the Commission itself until 2011. The awkward, unjust and incomplete result reached by the Bureau in this case further demonstrates that exercising jurisdiction over ILEC attachments on electric utility poles was never a good idea, even if it was lawful (which it was not).

CONCLUSION

For the reasons set forth above, as well as the reasons previously stated in DEP's answer, declarations, documentary evidence and briefing, DEP respectfully petitions the Bureau to reconsider the portions of its September 21, 2021 Order described herein.

Dated: October 21, 2021

Respectfully submitted,

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RULE 1.721(m) VERIFICATION

I, Eric B. Langley, as signatory to this submission, hereby verify that I have read DEP's Petition for Reconsideration of the Bureau's September 21, 2021 Memorandum Opinion and Order and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

/s/ Eric B. Langley
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Duke Energy Progress, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this day, October 21, 2021, a true and correct copy of Duke Energy Progress, LLC's Petition for Reconsideration was filed with the Commission via ECFS and was served on the following (service method indicated):

Robert Vitanza Gary Phillips David Lawson AT&T SERVICES, INC. 1120 20th Street NW, Suite 1000 Washington, DC 20036 (by U.S. Mail)	Marlene H. Dortch, Secretary Federal Communications Commission 9050 Junction Drive Annapolis Junction, MD 20701 (by FedEx Overnight and ECFS)
Christopher S. Huther Claire J. Evans Frank Scaduto WILEY REIN LLP 1776 K Street NW Washington, DC 20006 chuther@wileyrein.com cevans@wileyrein.com fscaduto@wileyrein.com (by E-Mail)	Rosemary H. McEnery Mike Engel Lisa J. Saks Lisa Boehly Sandra Gray-Fields Federal Communications Commission Market Disputes Resolution Division Enforcement Bureau 445 12th Street, SW Washington, D.C. 20554 Rosemary.McEnery@fcc.gov Michael.Engel@fcc.gov Lisa.Saks@fcc.gov Lisa.Boehly@fcc.gov Sandra.Gray-Fields@fcc.gov (by E-Mail)
Charlotte A. Mitchell, Chair North Carolina Utilities Commission 4325 Mail Service Center Raleigh, NC 27699-4300 (by U.S. Mail)	Kimberly D. Bose, Secretary Federal Energy Regulatory Commission 888 First Street, NE Washington, DC 20426 (PUBLIC VERSION ONLY by U.S. Mail)
Justin T. Williams, Chairman Public Service Commission of South Carolina 101 Executive Center Dr., Suite 100 Columbia, South Carolina 29210 (by U.S. Mail)	

/s/ Eric B. Langley
Eric B. Langley
Counsel for Defendant,
Duke Energy Progress, LLC